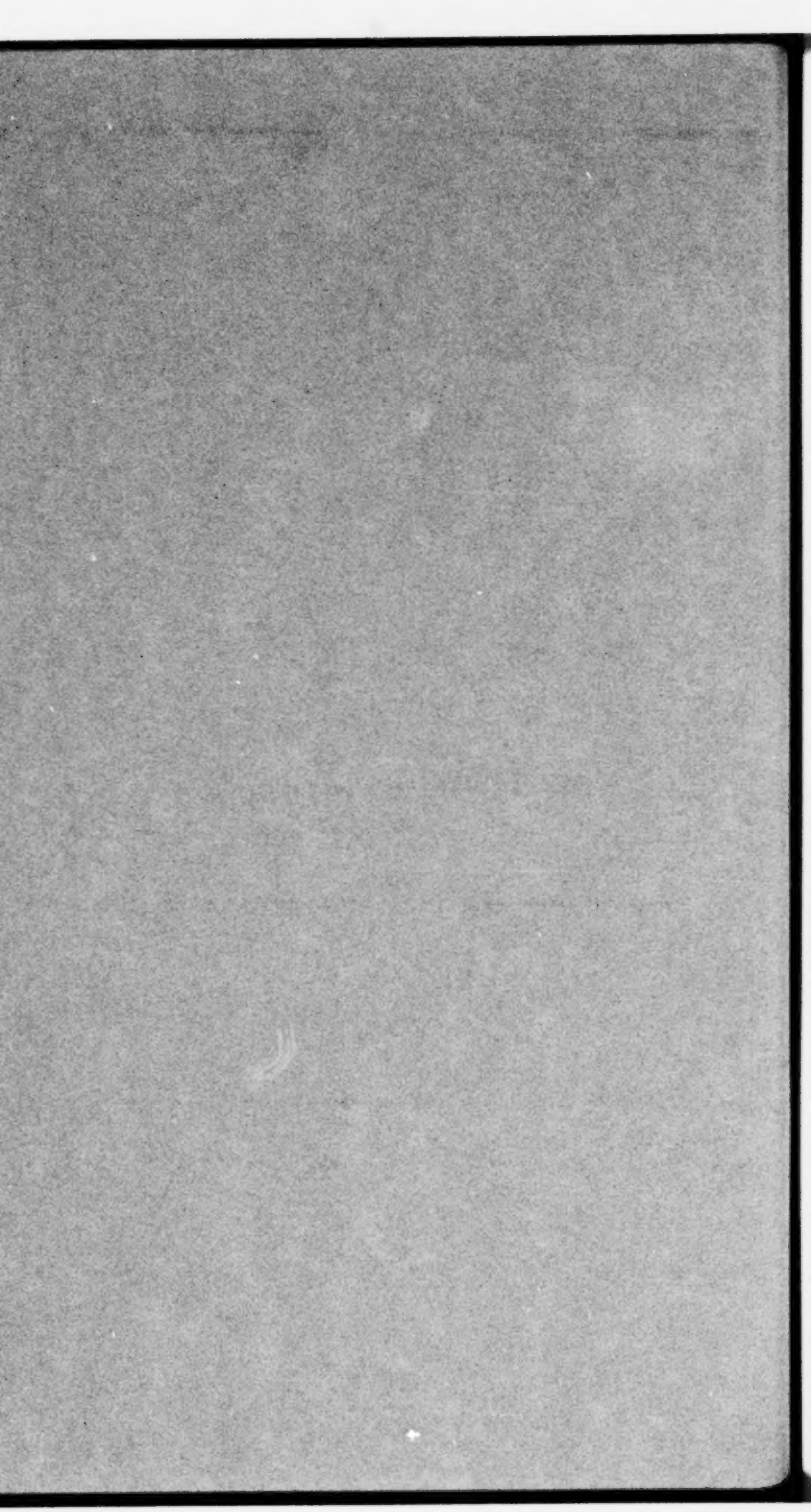

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A-1

Order Of The District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

| | | |
|---|---|---|
| MABEL FLINN, et al. | ) | |
| | ) | |
| vs. | ) | Civil Action |
| | ) | No. 71-3-P |
| FMC CORPORATION, et al. | ) | |
| | ) | |
| and | ) | |
| | ) | |
| MABEL TIBBS | ) | |
| | ) | |
| vs. | ) | Civil Action |
| | ) | No. 71-2-P |
| FMC CORPORATION | ) | |
| | ) | |

ORDER

In these causes upon the representations made at a pre-trial conference held on November 7, 1973 and the oral Motions made at said conference, the Court finds as follows:

That the joint Motion of counsel for all parties to consolidate the two above referenced cases be, and it hereby is, GRANTED, and further

That the joint motion of counsel for all

parties to redefine the class of persons encompassed by the consolidated cases as "all of those hourly paid bargaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972, and in addition shall include Mabel Tibbs and Wilma Lee McCauley" be, and it hereby is, GRANTED, and further

That the defendants will pay into Court the sum of Fifty Eight Thousand Dollars ($58,000.00) to be paid to the attorneys of record for the plaintiffs for services rendered in this cause in the amount of Ten Thousand Dollars ($10,000.00), and the remaining Forty-Eight Thousand Dollars ($48,000.00) to be apportioned among the plaintiffs in such manner as the Court shall determine based upon further argument or evidence, and further

The Court takes under advisement the Motion of Counsel for the Plaintiffs for payment of attorneys fees prior to the entry of a final order in this cause, and it is further

ORDERED that the parties will submit briefs to the Court by November 21, 1973 setting forth their positions and arguments as to how the sum paid into Court should be apportioned among the Plaintiffs and whether attorneys fees may be paid to Counsel for the Plaintiffs prior to entry of a final order, and it is further

ORDERED that the parties may submit reply briefs at their option no later than

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Order Of The District Court

November 28, 1973.

All other matters are reserved for further determination by the Court.

Approved for entry:

/s/ Whitworth Stokes

/s/ L. Edward Friend, II

Attorneys for Plaintiffs

/s/ Fred L. Davis, Sr.

Attorney for Defendant FMC Corporation

/s/ Gregory Abbey

/s/ Edward G. Atkins

Attorneys for Defendant Local 9, Textile Workers Union of America, AFL-CIO

SO ORDERED:

/s/ Robert E. Maxwell
UNITED STATES DISTRICT JUDGE

DATED: November 19, 1973.

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A-4

Order Of The District Court Regarding Notice To The Class

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MABEL TIBBS,

Plaintiff,

v. Civil Action File No. 71-2-P

FMC CORPORATION,

Defendant.

§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§

MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU,

Plaintiffs,

v. Civil Action File No. 71-3-P

FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Defendants.

ORDER

The Court, having been advised by counsel

that an agreed settlement of all claims presented in this civil action has been reached and that the next step in the advancement of this litigation is to determine the amount of attorney fees to which Whitworth Stokes, attorney for plaintiffs, is entitled under said settlement and to designate the distributees of the settlement sum and to determine the amount of that sum to which each distributee is entitled, it is

ORDERED that counsel for the parties to this action shall prepare and submit to the Court on or before April 30, 1974, their suggestions on a proposed notice, to be served upon all parties hereto, to all members of the class here represented and to the Equal Employment Opportunity Commission, which notice shall set forth the terms of the proposed settlement and proposed distribution. The proposed notice should also include, but not be limited to, the respective parties' recommendation as to attorneys' fees and costs as well as any other related matters that are apparent to counsel.

ENTER: April 5, 1974.

/s/ Robert E. Maxwell
United States District Judge

A-6

Notice Of Proposed Settlement

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

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|---|---|---|
| MABEL TIBBS, | ] | |
| | ] | |
| Plaintiff, | ] | CIVIL ACTION |
| | ] | |
| v. | ] | NO. 71-2-P |
| | ] | |
| FMC CORPORATION, | ] | |
| | ] | |
| Defendant. | ] | |
| | | |
| MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU, | ] | |
| | ] | |
| | ] | |
| Plaintiffs, | ] | CIVIL ACTION |
| | ] | |
| v. | ] | NO. 71-3-P |
| | ] | |
| FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, | ] | |
| | ] | |
| Defendants. | ] | |

NOTICE OF PROPOSED SETTLEMENT

Notice Of Proposed Settlement

TO: EACH OF THE ABOVE NAMED PARTIES PLAINTIFF AND TO WILMA LEE McCAULEY; AND TO ALL FEMALE EMPLOYEES WITHIN THE HOURLY BARGAINING UNIT AT THE PARKERSBURG PLANT OF FMC CORPORATION AS OF DECEMBER 31, 1972; AND TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:

This action is pending in the United States District Court for the Northern District of West Virginia on behalf of named and unnamed female employees in the Parkersburg plant, FMC Corporation, alleging discrimination against such employees by the company, FMC Corporation, and the Union. FMC and the Union do not admit the alleged discrimination and discriminatory effects alleged in the complaints.

Pursuant to Order of the Court on August 23, 1973, the Court declared the case of Mabel Flinn, et al, to be a class action and allowed the motion of Plaintiff Wilma Lee McCauley to intervene as a member of the class. On November 19, 1973, the Court further ordered that the case of Mabel Tibbs and the case of Mabel Flinn, et al, be consolidated and that the class defined in the consolidated action be described as:

"All of those hourly paid bar-

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gaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972, and in addition shall include Mabel Tibbs and Wilma Lee McCauley."

Following extensive negotiations, analysis of the legal precedents, an evaluation of the evidence, and in the interests of avoiding lengthy delay and the uncertainty and expense of litigation, the representative of the parties have proposed to the Court a settlement of all parts of the litigation. In addition, all of the prospective substantive relief available to the claimants has already been granted, outside of litigation, by changes in work practices and seniority structures and through negotiations between the defendant Company and Union.

Aside from, and in addition to the relief referred to, the defendants, FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO, by a settlement agreement submitted to the Court on November 7, 1973, and pursuant to its Order, have paid into Court the sum of Fifty-Eight Thousand Dollars to be apportioned among the members of the class in such manner as the Court may direct, and as and for allocation for reasonable attorney

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fees, costs, and expenses. Further defendant FMC Corporation has agreed to bear any additional costs associated with the giving of this notice and the actual distribution of funds.

Of the total payment of $58,000 represented in the settlement, $48,000 thereof shall be allocated as follows:

First: $46,000 shall be allocated to all members of the class as defined above, except claimants Tibbs and McCauley. This class shall be broken down into three subclasses on the following basis:

(a) Subclass 1 shall be comprised of all of those members having a plant seniority date prior to January 1, 1965. This subclass consists of 126 members, each of whom, under the terms of this settlement, shall receive the sum of Two Hundred and Fifty-Five Dollars ($255).

(b) Subclass 2 shall be com-

prised of all of those members excluded from Subclass 1 having a plant seniority date prior to December 31, 1968. This subclass consists of 43 members, each of whom, under the terms of this settlement, shall receive the sum of One Hundred Seventy Dollars ($170).

(c) Subclass 3 shall be comprised of all of those members excluded from Subclasses 1 and 2, having a seniority date prior to December 31, 1972. This subclass consists of 82 members, each of whom, under the terms of this settlement, shall receive the sum of Eighty-Five Dollars ($85).

Second: Plaintiff Mabel Tibbs initially brought a separate action and has not, and cannot now benefit from any of the prospective relief available to other members of the class, and in full settlement of any and all claims she has asserted in that proceeding shall be allowed the sum of One

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Thousand Five Hundred Dollars ($1,500).

Third: Plaintiff-Intervenor Wilma Lee McCauley, who also is unable to participate in prospective relief available to members of the class, shall be allowed the sum of Five Hundred Dollars ($500) in full release of any and all claims she may have as a member of this class.

Whitworth Stokes, Esquire, Counsel for the Plaintiffs, has expended considerable time and expense in preparation of this action, in discovery, and negotiations, and is entitled to be reimbursed for such costs and expenses and to a reasonable attorney's fee. Counsel has requested, and both defendants agree, that such costs, expenses, and reasonable attorney's fee shall be in the amount of Ten Thousand Dollars ($10,000).

At such time as this settlement is approved by the Court, each member shall receive her share of the settlement which will be in full satisfaction of any claim arising out of the matters alleged in the complaints.

If any member of the class wishes

to object to the proposed settlement or does not wish to participate therein, she may object by serving written notice on or before the 28th day of June, 1974, directed to The Honorable Thomas F. Stafford, Clerk of the United States District Court for the Northern District of West Virginia, Elkins, West Virginia 26241.

This notice is given pursuant to Order of the United States District Court for the Northern District of West Virginia.

June 5, 1974

A-13

Order Of The District Court Approving Compromise Settlement

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA PARKERSBURG

| | | |
|---|---|---|
| MABEL TIBBS, | ] | |
| | ] | |
| Plaintiff, | ] | CIVIL ACTION |
| | ] | NO. 71-2-P |
| v. | ] | |
| | ] | |
| FMC CORPORATION, | ] | |
| | ] | |
| Defendant. | ] | |
| | ] | |
| MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU, | ] | |
| | ] | |
| Plaintiffs, | ] | CIVIL ACTION |
| | ] | NO. 71-3-P |
| v. | ] | |
| | ] | |
| FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, | ] | |
| | ] | |
| Defendants. | ] | |

ORDER APPROVING COMPROMISE SETTLEMENT

Actions having been brought by Mabel Tibbs,

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A-14

## Order Of The District Court Approving Compromise Settlement

Plaintiff, v. FMC Corporation, Defendant, and Mabel Flinn, Geneva Lynn, and Gamet Loiseau, Plaintiffs, v. FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO, Defendants, in this Court, and pursuant to order of the Court entered on August 23, 1973, the Court declared the case of Mabel Flinn, et al. to be a class action and permitted Wilma Lee McCauley to intervene as a member of the class, and thereafter, on November 19, 1973, the Court further ordered that the said case of Mabel Tibbs and the said case of Mabel Flinn, et al, be consolidated and that the class defined in the consolidated action be described as all of those hourly paid bargaining unit female members of the Parkersburg Plant of the Company's work force on the active payroll as of December 31, 1972, and in addition, shall include Mabel Tibbs and Wilma Lee McCauley; and the parties having appeared by their respective counsel and tendered to the Court for approval a proposed settlement agreement of all parts of the litigation and pursuant to order of the Court, the defendants paid into Court the sum of $58,000 to be apportioned among the members of the class in such manner as the Court may direct and for reasonable attorney fees, costs, and expenses; and after a hearing thereon, the Court directed that a copy of the notice of the proposed settlement be mailed to each of the named plaintiffs and to Wilma Lee McCauley and to all female employees within the hourly bargaining unit at the Parkersburg Plant of FMC Corporation as of December 31, 1972,

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and to the Equal Employment Opportunity Commission, the form of said notice having been approved by said Court under date of June 4, 1974; and said notice having been mailed as aforesaid as ordered by the Court and objection having been made, in writing, by Mabel Tibbs, Mabel Flinn, Geneva Lynn, Garnet Loiseau, and Mary Custis, being five members of the class, and a hearing having been held by the Court at Parkersburg, West Virginia, on August 2, 1974, at which time each of the objecting members of the class testified in support of their objections to the proposed settlement; and

The Court, having maturely considered the entire record in this case, the proposed notice of settlement and the settlement terms set forth therein and the testimony of said objectors and argument of counsel for all parties, is of the opinion to and doth ORDER that the proposed settlement is adequate, reasonable and meets the standards of fairness and it is hereby approved; and it is further

ORDERED that the objections are overruled and the requests for withdrawal are denied; and it is further

ORDERED that the settlement be consummated in accordance with the terms of said notice of proposed settlement; and it is further

ORDERED that in accordance with the

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terms of said settlement the said defendants be and they are hereby fully released and forever discharged from any and all claim or claims, or cause or causes of action, or part or parts thereof, from the matters set forth in the Complaints; and it is further

ORDERED that plaintiffs' counsel, Whitworth Stokes, be paid $3,000 at this time out of the amount allocated in the settlement agreement for reasonable attorney fees, costs and expenses and that within three weeks from the date of this order said plaintiffs' counsel shall submit to the Court additional information, under oath, and filed with the Clerk, concerning the number of hours spent in performing services in this litigation and itemization of expenses incurred by him and that copy of said verified statement be sent to each of the objecting parties and to Fred L. Davis, of counsel for FMC Corporation; General Counsel for the Textile Workers Union of America; and the Equal Employment Opportunity Commission; who shall have two weeks thereafter for filing objections to same; and it is further

ORDERED that this Court shall retain jurisdiction in this consolidated action for the purpose of fixing and allowing upon the proof above set forth as the Court shall direct, additional fees to Whitworth Stokes for his services rendered and disbursements; and it is further

ORDERED that the Clerk of this Court issue check in the sum of $51,000, payable to

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the order of Fred L. Davis, Trustee, who is directed to deposit said check in the Union Trust National Bank, Parkersburg, West Virginia, in the name of Fred L. Davis, Trustee, and that said Trustee is directed to distribute out of said money the sum of $3,000 to Whitworth Stokes, attorney as aforesaid, and the remaining $48,000 to be distributed as set forth in the Notice of Proposed Settlement.

Dated: August 19, 1974.

ENTER:

/s/ Robert E. Maxwell
United States District Judge

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 74-2198

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MABEL FLINN, GENEVA LYNN
and GARNET LOISEAU,

Appellants,

-versus-

FMC CORPORATION and LOCAL 9
TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO,

Appellees.

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Appeal from the United States District
Court for the Northern District of
West Virginia, at Parkersburg.
Robert E. Maxwell, District Judge.

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Argued: May 7, 1975 Decided: Oct. 6, 1975

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Opinion Of The Court of Appeals

Before BOREMAN, Senior Circuit Judge, and RUSSELL and FIELD, Circuit Judges.

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M. E. Mowery for Appellants; Fred L. Davis, James R. Renfroe (Robert F. St. Aubin, McDougle, Davis, Handlan and Davis on brief) for Appellee FMC Corporation; Gregory Abbey for Appellee Local 9, Textile Workers Union of America, AFL-CIO.

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RUSSELL, CIRCUIT JUDGE:

This is an appeal from an order of the District Court approving the settlement of a class action asserting a claim of sex discrimination under the provisions of Title VII. The scope of our review on such an appeal is narrow. [1] We are not, in reviewing the settlement, to "substitute our ideas of fairness for those of the district judge * * * ." [2] Our power,

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[1] Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic. (2d Cir. 1975) 514 F. 2d 767, 771.

[2] Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., supra (514 F. 2d at 771); State of West Virginia v. Chas. Pfizer & Co. (2d Cir. 1971) 440 F. 2d 1079, 1086, cert. denied 404 U. S. 871 (1971).

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as the appellants concede and the authorities abundantly affirm, is only to be exercised "upon a clear showing that the district court abused its discretion" in approving the settlement.[3] The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits, for, as the Court said in City of Detroit v. Grinnell Corporation (2d Cir. 1974) 495 F. 2d 448, 455, "[I]f the settlement offer was grossly inadequate, * * * it can be inadequate only in light of the strength of the case presented by the plaintiffs."

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[3] Grunin v. International House of Pancakes (8th Cir. 1975) 513 F. 2d 114, 123; Greenspun v. Bogan (1st Cir. 1974) 492 F. 2d 375, 379; State of West Virginia v. Chas. Pfizer & Co., supra, (440 F. 2d at 1085, n. 1); United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co. (7th Cir. 1971) 447 F. 2d 647, 655; Young v. Katz (5th Cir. 1971) 447 F. 2d 431, 433. In the latter case, the Court, quoting with approval from the District Court opinion in Neuwirth v. Allen, as affirmed in (2d Cir. 1964) 338 F. 2d 2, said:

> " ' * * * The action of the District Court [in affirming the settlement] is presumptively right, and will not be set aside unless clearly shown to have been wrong. * * * ' "

The trial court should not, however, turn the settlement hearing "into a trial or a rehearsal of the trial" [4] nor need it "reach any dispositive conclusions on the admittedly unsettled legal issues" in the case. [5] It is not part of its duty in approving a settlement to establish that "as a matter of legal certainty * * * the subject claim or counterclaim is or is not worthless or

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4 Teachers Ins. & Annuity Ass'n. of America v. Beame (S.D.N.Y. 1975) 67 F.R.D. 30, 33; Levin v. Mississippi River Corporation (S.D.N.Y. 1973) 59 F.R.D. 353, 361, aff'd. sub nom Wesson v. Levin 486 F. 2d 1398, cert. denied 414 U. S. 1112 (1973). In Levin, the Court said:

> " * * * So, too, the Court is cautioned not to turn the settlement hearing into a trial or a rehearsal of a trial. To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more delicate one', which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate * * *."

5 State of West Virginia v. Chas. Pfizer & Co., supra, (440 F. 2d at 1086).

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valuable." [6] It is not, though, to give to the settlement "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." [7] While it should extend to any objector to the settlement "leave to be heard, to examine witnesses and to submit evidence" on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. [8] So long as the record before it is adequate to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the

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[6] Florida Trailer and Equipment Company v. Deal (5th Cir. 1960) 284 F. 2d 567, 571.

[7] Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (1968) 390 U.S. 414, 434, reh. denied 391 U. S. 909 (1968); Newman v. Stein (2d Cir. 1972) 464 F. 2d 689, 692, cert. denied 409 U.S. 1039 (1972); City of Detroit v. Grinnel Corporation, supra (495 F. 2d at 462).

[8] Glicken v. Bradford (S.D.N.Y. 1964) 35 F.R.D. 144, 148:

> " * * * this is not a trial and the test of the evidence which the Court should receive on a settlement is whether the proferred proof is of a nature which will aid it in passing upon the essential fairness and equity of the settlement."

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complexity, expense and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," it is sufficient. [9]

In reviewing the record and evaluating the strength of the case, the trial court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented the plaintiffs in the negotiation. [10] The fact that all discovery has been completed and the cause is ready for trial is important, since it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case. [11] Collusion and bad faith on the part of those purporting to represent the class in the negotiations will, of course, impugn the settlement. [12] While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial

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9 See authorities cited under Note 7.

10 City of Detroit v. Grinnell Corporation, supra (495 F. 2d at 463).

11 See United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co., supra (447 F. 2d at 655).

12 Wainwright v. Kraftco Corporation (N.D. Ga. 1973) 58 F.R.D. 9, 11.

court, [13] such opinion should be given weight in evaluating the proposed settlement. [14] The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court, [15] though "a settlement is not unfair or unreasonable simply because a large number of class members oppose it." [16] And because the cash settlement "may only amount to a fraction of

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[13] Cohen v. Young (6th Cir. 1942) 127 F. 2d 721, 725, cert. denied 321 U. S. 778 (1973). In this case, the trial court had refused to exercise its discretion on "the adequacy and fairness of the settlement upon the ground that it had no power to do so since the attorneys of record approved the compromise."

[14] Blank v. Talley Industries, Inc. (S.D.N.Y. 1974) 64 F.R.D. 125, 132; Halfand v. New America Fund, Inc. (E.D. Pa. 1974) 64 F.R.D. 86, 90; Oppenlander v. Standard Oil Company (D. Colo. 1974) 64 F.R.D. 597, 624.

[15] Greenspun v. Bogan, supra (492 F. 2d at 379); City of Detroit v. Grinnel Corporation, supra (495 F. 2d at 462); Kurach v. Weissman (S.D.N.Y. 1970) 49 F.R.D. 304, 306.

[16] Bryan v. Pittsburgh Plate Glass Co. (3d Cir. 1974) 494 F. 2d 799, 803, cert. denied 419 U. S. 900 (1974).

the potential recovery" will not per se render the settlement inadequate or unfair. [17] With particular reference to class actions under Title VII, any settlement should receive careful review because of the public policy embodied in such legislation, but the clearly expressed intent of that Act to encourage settlements must be borne in mind. [18]

Applying these principles to the settlement approved in this case, we find no abuse of discretion on the part of the trial court. The settlement as approved was not hastily arrived at. It followed protracted discussions and was reached on the eve of trial after prior negotiations had failed. The plaintiffs were represented in the negotiation by their retained counsel, who had had extensive experience in handling sex and racial discrimination cases. His good faith and competency are not challenged. A representative of the Equal Employment Opportunity Commission was present during the hearings on the settlement and presumably fully informed herself of the terms of the settlement and its fairness. In the class involved in the suit were 253 female employees of the defendant. All these employees

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[17] City of Detroit v. Grinnell Corporation, supra (495 F. 2d at 455).

[18] Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., supra (514 F. 2d at 771).

were given a carefully drafted statement of the settlement as well as were provided adequate notice of the hearing thereon and of their right to object thereto. Only five members of the class filed any dissent from the settlement. Three of these were the original plaintiffs in the class suit. [19] They appeared with new counsel, who had been retained to represent them in objecting to the settlement. They were given ample opportunity to present testimony and to be heard on the settlement. They alone appeal from the approval of the settlement.

The first objection of the appellants to the settlement was that the trial court, in approving the settlement, did so "simply because it was

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[19] Appellants do not argue, nor may they under the authorities, that assent of the class plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable. The original plaintiffs, however, should be given the opportunity to retain new counsel to represent them in objecting to the settlement and to be heard in opposition. See Saylor v. Lindsley (2d Cir. 1972) 456 F. 2d 896, 899-90, and Ace Heating & Plumbing Company v. Crane Company (3d Cir. 1971) 453 F. 2d 30, 33-4. That right was accorded the appellants by the District Court in this case and the appellants exercised that right as evidenced by this appeal and the record in the court below.

agreed upon by counsel for the respective parties." The record disproves any such contention. The trial court recognized and stated positively in the record that the mere fact that counsel "believe it is an honorable settlement" and one which "in in their considered judgment, the appropriate way to terminate the litigation," did not relieve the Court of its responsibility to "oversee, overview and to ultimately pass upon the question of whether the proposed settlement agreement meets the test, the criteria, the standards that are impressed upon the Court by Act of Congress." It later in its oral opinion approving the settlement emphasized anew the Court's responsibility in approving a settlement of a class action. It stated that "it is the sole responsibility of the Court * * * in approving or disapproving a settlement such as presented here."

The appellants go on to assert that, even if the trial court had recognized its responsibility in connection with the proposed settlement, it failed to have " a trial or hearing on the merits of the allegations raised in the employee's complaint." There is, as we have seen, no requirement for a trial on the merits as a prerequisite to approval of a settlement. All discovery had been completed in the case, which had been pending for several years in the court. Various motions had been heard, including one for summary judgment and another involving the designation of the suit as a class action. The trial court had considerable familiarity with the

case and the respective positions of the parties. Further, it had extended to the appellants the right to present fully on the record their objections to the settlement. In their testimony, they gave the case the appearance more of a complaint about seniority and transfer rights under their collective bargaining agreement than about sex discrimination. Their real complaint related to the effect of such transfers, the propriety of which on technological grounds they did not dispute, on their seniority. The appellant Loiseau, for instance, stated her complaint arose out of a transfer made in 1958 from an incentive pay department to a straight hourly pay department and to the granting of priority in available incentive pay jobs to employees brought over from the discontinued plant of the appellee at Roanoke. However, the employees brought from Roanoke, who secured the job she wanted, were, she admitted, female, too. The appellant Flinn testified that her complaint arose out of a departmental transfer that took place in 1963. She claimed that an employee when transferred to another department was not allowed to carry her seniority with her, though she asserted this was contrary to the collective bargaining agreement. [20] It was conceded,

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[20] Her testimony on this point was that, under Section D of the collective bargaining agreement, "when the jobs are transferred to another department, the employees so affected would move with no loss of adjusted seniority." She complained to the Union on this but, according to her, the Union "refused" to do anything.

however, that the seniority rules were negotiated between the employer and the Union and were "applicable to males and females alike." The appellant Lynn, according to her testimony, "had to transfer due to customer requirements and I had to transfer and lost half of my seniority." Her loss of seniority placed her behind other female employees in the department to which she transferred. In their complaint, the appellants seemed to base their claim of sex discrimination on the assertion that female employees were employed on an incentive pay basis, whereas male employees were on a straight hourly pay basis. As we have seen, however, the appellants, in their own statements of their complaint, objected to being transferred from an incentive pay basis to a straight hourly pay basis, and the reason expressed for their discontent was than an employee earned more on an incentive pay basis than on a straight hourly pay basis. Moreover, no one of the appellants, though conceding that the settlement of transfer rights gave them the privilege of transferring to straight time, had claimed any such right. This reinforces the conclusion that the claim of the appellants related not so much to sex discrimination as to their right, when required to transfer, to transfer to an incentive pay job rather than to a straight hourly pay job.

The trial court, in its oral order approving the settlement, reviewed this testimony and other evidence in the record. Its review demon-

strated its familiarity with the contentions of the parties and its careful evaluation of the merits of the appellants' claims. It recognized that there were two classes of female employees involved. The three objectors, as we have already observed, really were complaining about the seniority rules applicable in connection with departmental transfers, whether by males or females. These transfers ante-dated the enactment of Title VII. And the persons who secured priority in seniority over them on transfer were, it would seem, women. Whatever their complaint, they concede it has been satisfied "by virtue of the collective bargaining process." The trial court indicated the weakness it perceived in this claim of the appellants themselves. It took particular note of the possible untimeliness of the plaintiffs' claims and of the alleged bar of the statute of limitations. On the other hand, there were some female employees engaged in custodial work, whose pay was less than that of the male employees on the custodial force. Whether there was some bona fide occupational justification for this difference and whether the male employees performed additional services were claims asserted in defense. Who would prevail in connection with these claims was, in the opinion of the Court, in doubt. In any event, the settlement on the merits has resolved this issue to the satisfaction of the employees concerned and no employee in this group has appealed from the approval of the settlement.

Actually, the appellants do not, it would

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seem, complain of the overall amount to be paid under the settlement. It is what they are individually to receive out of that settlement that prompts their objection and this appeal. The amount each employee, it is true, is receiving is not large. And an employee, who feels she was discriminated against in 1958 will naturally feel that she should receive considerably more than a fairly recent employee, even though her claim of unfairness occurred some six years before the enactment of the statute on which she bases her action. This feeling is no doubt increased by the consideration that the appellants were the ones who brought the action and had by their efforts made available the fund. It must be borne in mind, though, that the appellants chose to bring their action as a class action, over the objection of the appellee. In so doing, they disclaimed any right to a preferred position in the settlement. Moreover, despite the fact that their complaint relates to an act that occurred many years ago, it may well be, as the trial court observed, that their individual claims would be considerably weaker than others in the class, particularly those working on the custodial force. The trial court was entitled to consider, in evaluating the fairness of the cash settlement, that all complaints of unfairness, whether they related to seniority rights under the collective bargaining agreement or any form of discrimination, racial or sexual, had been satisfied and that settlement had been "approved by the Government." As the Court in City of Detroit said, "[A]ny claim by appellants that the

settlement offer is grossly and unreasonably inadequate is belied by the fact that, for all appearances, the vast preponderance of the class members willingly approved the offer." [21] Under all these circumstances, we find no abuse of discretion on the part of the trial court in approving the settlement herein. The judgment of the District Court approving the settlement is accordingly affirmed.

AFFIRMED.

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21 495 F. 2d at 462.

## Rule 23, Federal Rules of Civil Procedure

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a

specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

## CERTIFICATE OF SERVICE

Three copies of the Petition for a Writ of Certiorari and Appendix have been furnished, by United States mail, first-class, postage prepaid, this 5th day of January, 1976, to:

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